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92-615

No. 92-___

Supreme Court, U.S.
FILED
OCT 8 1992
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In The

Supreme Court of the United States

October Term, 1992

PACIFIC TELESIS GROUP, a Corporation, PACIFIC BELL, a Corporation, PACIFIC BELL DIRECTORY, a Corporation,

Petitioners,

vs.

TALKING YELLOW PAGES, INC., dba PRIMEX,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals erred in holding that the dangerous probability of success and specific intent elements of an attempted monopoly claim can be inferred solely from a telephone information service provider's allegations that a telephone company provided it with poor local telephone service? The issue is identical to that in *Spectrum Sports, Inc. v. McQuillan,* No. 91-10, in which this Court has granted certiorari and which is now pending for argument.

PARTIES AND RULE 29.1 STATEMENT

All parties to the proceeding appear in the caption of the case.

Petitioners submit the following information pursuant to Rule 29.1 of this Court's rules:

Petitioner Pacific Bell is a wholly owned subsidiary of Pacific Telesis Group. Petitioner Pacific Bell Directory is a wholly owned subsidiary of Pacific Bell. All of Petitioner Pacific Bell's subsidiaries are wholly owned except Bell Communications Research, Inc.

All of Petitioner Pacific Telesis Group's subsidiaries are wholly owned except for the following:

Athens Cellular, Inc.
Cellular Communications, Inc.
Kansai Digital Phone Co., Limited
Kinitel Hellenic Mobile Telephone Company, S.A.
Mannesmann Mobilfunk GmbH
METROPHONES Company Limited
PacTel Meridian Systems
Percom Services Limited (Thailand)
Sistelcom, S.A.
South Yorkshire Cablevision Limited
Telecel – Communicacoes Pessoais, S.A.
Tokai Digital Phone Co., Limited
Tokyo Digital Phone Co., Limited

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No. 92-___

In The

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October Term, 1992

PACIFIC TELESIS GROUP, a Corporation, PACIFIC BELL, a Corporation, PACIFIC BELL DIRECTORY, a Corporation,

Petitioners,

vs.

TALKING YELLOW PAGES, INC., dba PRIMEX,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners, Pacific Telesis Group, Pacific Bell and Pacific Bell Directory, respectfully pray that a writ of certiorari issue to review the decision of the Ninth Circuit, entered August 26, 1992. This case involves the application of the Ninth Circuit's unique rule which, in conflict with every other Circuit that has considered the question, allows a trier of fact in an attempt to monopolize case to infer dangerous probability and specific intent from predatory conduct. The same issue is before this Court in *McQuillan v. Sorbothane, Inc.*, 907 F.2d 154 (9th Cir. 1990) (mem.), *cert. granted sub nom. Spectrum Sports,*

Inc. v. McQuillan, 112 S.Ct. 1557 (1992). Accordingly, it would be appropriate to hold the present petition for disposition in light of this Court's decision in *Spectrum Sports, Inc.*

OPINIONS BELOW

The memorandum opinion of the Ninth Circuit appears in the Appendix at p. la. The order of the United States District Court for the Northern District of California dismissing the first amended complaint without leave to amend appears in the Appendix at p. 8a. The District Court's order denying a motion for new trial appears in the Appendix at p. 11a. The order of the Ninth Circuit granting Petitioners' motion to stay the mandate to and including October 16, 1992, to permit the filing and subsequent disposition of a petition for certiorari, is included in the Appendix at p. 16a. All are unreported decisions.

JURISDICTION

The decision of the Court of Appeals was entered August 26, 1992. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any

other person or persons, to monopolize any part of the trade or commerce among several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

Parties

Petitioner Pacific Telesis Group is one of the seven regional holding companies formed in connection with the divestiture of AT&T; it is the parent company of Petitioner Pacific Bell. Pacific Bell, a regulated public utility, provides local telecommunication services in California. Petitioner Pacific Bell Directory, an unregulated subsidiary of Pacific Bell, publishes and distributes printed classified or commercial advertising directories known as the "Pacific Bell SMART Yellow Pages." App., p. 12a. The Petitioners will be referred to collectively as "Pacific."

Respondent Talking Yellow Pages, Inc. dba Primex is a corporation which provides "telephone information services." App., p. 11a. Primex gives callers information over the telephone concerning its subscribing advertisers and can directly connect a caller to a selected advertiser's offices. *Ibid.* Primex specializes in referring its callers to doctors, lawyers and accountants.

Respondent's Complaint

Primex[1] sued Pacific alleging that Pacific Bell failed to provide adequate local telephone service to Primex in order to harm Primex's business. Primex's first amended complaint alleges violations of the Sherman Act and a series of pendent California state law claims. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1337 and 15 U.S.C. §§ 15, 22, and 26.

The complaint alleges that Primex's "telephonic information services" and Pacific's printed directories and directory assistance compete directly. However, Primex does not describe the scope of the market, name other competitors in the relevant market, nor allege Pacific's relative market share. App., pp. 4a-5a, 14a-15a. Moreover, Primex acknowledges that, during the time period alleged in the complaint, Pacific was barred by a consent decree from entering the telephonic information services market in which Primex competes.[2] The consent

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[1] Primex filed a joint complaint with Yellow Phone, another provider of telephone directory services. After the district court dismissed the complaint, Yellow Phone dismissed its appeal to the Ninth Circuit as part of a settlement with Pacific. Yellow Phone entered into the settlement after it lost a California state court trial of a suit alleging unfair competition and other similar claims based on Yellow Phone's purported problems with Pacific Bell's local telephone service.

[2] In July, 1991, subsequent to the events on which Primex's complaint is based, the United States District Court for the District of Columbia Circuit modified the consent decree by removing the information services restriction. *United States v. Western Electric Co.*, 767 F.Supp. 308 (D.D.C. 1991), *vacating stay*, 1991-2 Trade Cas. (CCH) ¶ 69, 610 (D.C.Cir. 1991), *appeal filed, United States v. Western Electric Co. and National Association of*

decree referred to as the "Modification of Final Judgment" that divested Pacific Telesis Group and the other regional holding companies from AT&T in 1984 prevented the regional holding companies and their subsidiaries from providing information via telecommunications and offering services such as those provided by Primex. *United States v. American Telephone and Telegraph Company*, 552 F.Supp. 131, 229 (D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

Despite the consent decree restrictions which prevented Pacific from providing telephonic information services, Primex alleges that Pacific Bell used its " 'bottleneck' monopoly" over telephone services and equipment "to monopolize the telephonic information service market." Pacific allegedly attempted to achieve the monopoly by delaying proper repair of Primex's telephone problems, blocking and disconnecting calls to Primex and interfering with Primex's telephone lines. App., p. 3a.

Allegedly as a result of Pacific's conduct, Primex claims that it has been unable to expand and has lost clients and profits. App., p. 4a. Primex alleges that in order to overcome the alleged defects in Pacific Bell's service, Primex purchased its own telephone system and switch. This private system enabled Primex to override Pacific Bell's system. *Ibid.*

Broadcasters (Nos. 91-5263, et al.). Several intervenors (including Primex) have appealed the order lifting the information services restriction.

District Court Proceedings

The district court granted Pacific's motion to dismiss the first amended complaint for failure to state a claim[3] without leave to amend. App., p. 8a. The district court dismissed Primex's Section 2 monopolization claim because Primex could not allege facts showing an antitrust injury or injury to competition. In addition, the district court held that Primex had failed to plead sufficient facts to show that Pacific has either an actual monopoly or poses a dangerous probability of successfully monopolizing the relevant market. App., p. 9a.

Pursuant to Fed. R. Civ. P. 59(e), Primex filed a motion for a new trial on the ground that allegedly newly available evidence would allow Primex to state claims for violation of the Sherman Act. The district court denied Primex's motion because the evidence was not newly discovered, and because the contents of the documents did not in any event cure the deficiencies in Primex's complaint. The documents did not contain facts establishing an anti-competitive effect on the relevant market or an antitrust injury. App., pp. 14a-15a.

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[3] Primex incorporated all of its allegations regarding monopolization under Section 2 of the Sherman Act into a second cause of action for violation of Section 1 of the Sherman Act. The district court dismissed the Section 1 claim because Primex failed to allege facts showing an antitrust injury, a relevant market or an unreasonable restraint of trade. App., p. 9a. Primex did not challenge this ruling on appeal. *See* n.4, *infra*.

Ninth Circuit Decision

Primex appealed the orders dismissing its attempted monopolization claim under Section 2 of the Sherman Act and denying its motion for a new trial.[4] The Ninth Circuit first determined that Primex's contentions about Pacific Bell's poor telephone service and repairs sufficiently alleged "predatory" conduct. Then, following the Ninth Circuit's unique rule, the panel held that the other elements of an attempt to monopolize claim, *i.e.*, a specific intent to monopolize and a dangerous probability of success, could be inferred solely from the predatory conduct allegations. App., pp. 2a-4a. Thus, the Ninth Circuit found that Primex's allegations about poor telephone service standing alone, without any further allegations showing the scope of the market, Pacific's share of that market or any likelihood that Pacific could obtain a monopoly in any market, were sufficient to state an attempt to monopolize claim. The panel noted that the Ninth Circuit law allowing such inferences is currently being reviewed by this Court in *McQuillan v. Sorbothane, Inc.*, 907 F.2d 154 (9th Cir. 1990) (mem.), *cert. granted sub nom. Spectrum Sports Inc. v. McQuillan*, 112 S.Ct. 1557 (1992). App., p. 3a, n.2.

While holding that Primex had stated an attempt to monopolize claim based solely on Pacific Bell's allegedly "predatory" provision of poor telephone service, the Ninth Circuit agreed with the district court that Primex had failed to sufficiently allege antitrust injury. The panel

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[4] Primex did not challenge the district court's ruling on its Sherman Act Section 1 claim; it limited the issues on appeal to the dismissal of the monopolization claim.

held that the complaint focused entirely on harm to Primex and did not allege harm to competition in the relevant market. App., p. 4a-5a. Nonetheless, even though Primex failed to present any evidence of harm to a relevant market either in its amended complaint or in its motion for new trial, the panel reversed the district court's denial of leave to amend and remanded the case to give Primex another opportunity to present such allegations. App., pp. 6a-7a.

REASONS FOR GRANTING THE PETITION

The issue presented in this case is identical to the issue now pending before this Court in *McQuillan v. Sorbothane, Inc.*, 907 F.2d 154 (9th Cir. 1990) (mem.), *cert. granted sub nom. Spectrum Sports, Inc. v. McQuillan*, 112 S.Ct. 1557 (1992) ("*Spectrum Sports, Inc.*"). The question in both cases is the validity of a Ninth Circuit rule which allows Sherman Act Section 2 plaintiffs to establish attempted monopolization without presenting any evidence of a specific intent to destroy competition or a dangerous probability of success. No other Circuit follows this rule. As this Court has already recognized, the issue of the validity of the Ninth Circuit's unique rule is an important one meriting review. Accordingly, the Court should grant this petition and dispose of this case as appropriate in light of its decision in *Spectrum Sports, Inc.*

In *Spectrum Sports, Inc.*, the McQuillans, terminated distributors of Sorbothane athletic products, sued the manufacturer's distributor Spectrum Sports and its president who engineered the McQuillans' termination and

thereby became the sole United States distributor of Sorbothane athletic products. *McQuillan, et al. v. Sorbothane, Inc.*, Nos. 89-55326, 89-55329 and 89-55332, 1990 WL at *3-4 (9th Cir. July 3, 1990). The Ninth Circuit upheld a jury verdict against Spectrum Sports for attempted monopolization and violations of California state statutes and RICO. Applying the same rule applied by the panel in the present case, the Ninth Circuit found that because there was sufficient evidence of unfair or predatory conduct, the jury could infer that Spectrum Sports had the requisite specific intent and dangerous probability of success. *Id.* at *8-11. The McQuillans did not have to prove a relevant market or Spectrum Sports' marketing power. *Id.* at *10-11. The Ninth Circuit followed a series of cases beginning with *Lessig v. Tidewater Oil Company*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), which hold that unfair or predatory conduct alone may satisfy both the specific intent and dangerous probability elements of an attempted monopolization offense, without any proof of a relevant market or the defendant's market power. *Id.* at *8-10.

In *Spectrum Sports, Inc.*, this Court granted review of the following question: "Can manufacturer's distributor expressly absolved of violating Section 1 of Sherman Act be found liable, without any evidence of market power or specific intent, for attempting to monopolize solely by virtue of [a] unique Ninth Circuit rule?" *Spectrum Sports, Inc. v. McQuillan, cert. granted*, 60 U.S.L.W. 3669 (U.S. Mar. 31, 1992) (No. 91-10).

This case raises the same issue and highlights the flaws of the Ninth Circuit rule. Here, Primex conceded that it could not establish a violation of Section 1 of the

Sherman Act, and the Ninth Circuit confirmed that Primex failed to allege any facts showing harm to competition in the relevant market. App., pp. 4a-5a. Moreover, Primex acknowledged that Pacific was legally barred from the telephonic information services market that Primex claims Pacific attempted to monopolize during the relevant time period. Nonetheless, the Ninth Circuit held that Primex's allegations that Pacific Bell provided it with inferior local telephone service in order to harm its business established all the other elements of an attempt to monopolize claim. The court held that the purported poor telephone service constituted "predatory" conduct, and thus, by applying the Ninth Circuit's unique rule, that the court could infer a specific intent to destroy competition and a dangerous probability of success. App., p. 4a.

The Ninth Circuit's rule permitting such inferences has the effect of turning a customer's complaint about local telephone service into a potential antitrust violation exposing Pacific to treble damages. The Ninth Circuit's rule contradicts this Court's requirement that a plaintiff in an attempt to monopolize case show a defendant's specific intent to monopolize and ability to destroy competition in the relevant market. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177-178 (1965); *Lorain Journal Co. v. United States*, 342 U.S. 143, 153 (1951). Other Circuits have expressly rejected the Ninth Circuit's rule established in *Lessig, supra.*[5] These

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[5] *E.g., International Distribution Centers, Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 790-791 (2nd Cir.) *cert. denied*, 482 U.S. 915 (1987); *Consul Ltd. v. Transco Energy Co.*, 805 F.2d 490, 494, n.9

Circuits recognize that eliminating the plaintiff's burden of alleging and proving a dangerous probability of success would have the effect of unduly extending Section 2 of the Sherman Act to cover conduct that poses no real threat of monopolization and that is already covered by state business tort laws, and of discouraging the healthy competition that Section 2 is intended to nurture. *International Distribution Centers, Inc.*, 812 F.2d at 791; *see Photovest Corp.*, 606 F.2d at 712 ("one commentator has concluded that the *Lessig* approach 'reeks of overkill' "). This case is an example of how the Ninth Circuit rule can be used to extend the coverage of Section 2 of the Sherman Act to cover even a customer's complaint about local telephone service.

(4th Cir. 1986), *cert. denied*, 481 U.S. 1050 (1987); *American Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1366-1367 (Fed. Cir.), *cert. denied*, 469 U.S. 821 (1984); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 711-712 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980); *Edward J. Sweeney & Sons v. Texaco*, 637 F.2d 105, 117 (3rd Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 276, n.69 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); *E. J. Delaney Corporation v. Bonne Bell, Inc.*, 525 F.2d 296, 305-306 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976); *Acme Precision Products, Inc. v. American Alloys Corp.*, 484 F.2d 1237, 1240 (8th Cir. 1973).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted. Because of the identity of the issue presented with that in *Spectrum Sports, Inc.*, we submit that it would be appropriate to hold the present petition and dispose of it as appropriate in light of this Court's decision in that case.

Respectfully submitted,

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October 8, 1992

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APPENDIX A

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TALKING YELLOW PAGES, INC., dba PRIMEX, Plaintiff-Appellant, v. PACIFIC TELESIS GROUP, a Corporation; PACIFIC BELL, a Corporation; PACIFIC BELL DIRECTORY, a Corporation, Defendants-Appellees.	) CA No. 91-15994) DC No. CV-90-02155-JPV) MEMORANDUM*) (Filed Aug 26, 1992)

Appeal from the United States District Court
for the Northern District of California
John P. Vukasin, Jr., District Judge, Presiding

Argued and Submitted July 23, 1992
San Francisco, California

BEFORE: CANBY, REINHARDT and LEAVY, Circuit Judges

Talking Yellow Pages, Inc. ("Primex") appeals the district court's dismissal pursuant to Rule 12(b)(6) of its first amended complaint without leave to amend and the court's denial of its Rule 59 motion to reconsider the dismissal. We affirm the dismissal and the denial of the

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

motion to reconsider but reverse the denial of leave to amend.

I. Dismissal of the First Amended Complaint[1]

The following facts must be proved to establish an attempt to monopolize claim:

(1) specific intent to control prices or destroy competition;

(2) predatory or anticompetitive conduct to accomplish the monopolization;

(3) dangerous probability of success; and

(4) causal antitrust injury.

Pacific Express, Inc. v. United Airlines, Inc., 959 F.2d 814, 817 (9th Cir. 1992).

With respect to the first three prongs of this test, we have stated that "specific intent under the first element may be inferred from conduct under the second element, . . . if the conduct is predatory," and that "[a] dangerous probability of success under the last element may also be inferred from conduct that could support an inference of intent." *Thurman Industries, Inc. v. Pay 'n Pak Stores, Inc.*, 875 F.2d 1369, 1378 (9th Cir. 1989). *See also Gough v. Rossmoor Corp.*, 585 F.2d 381, 390 (9th Cir. 1978) (noting that specific intent and probability of success can

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[1] We review de novo a dismissal for failure to state a claim. We accept all allegations of material fact as true and construe them in the light most favorable to Primex. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989).

be inferred from predatory conduct), *cert. denied*, 440 U.S. 936 (1979).[2]

In this case, Primex alleges that its competitor, Pacific Telesis Group ("Pacific"), blocked and disconnected calls to Primex, caused Primex's telephone lines to become inoperable, and refused to repair or delayed in repairing problems with Primex's telephone lines. Primex argues that these contentions sufficiently allege predatory conduct, because, if true, they indicate that Pacific has impaired Primex's business opportunities not through competition on the merits but rather through attempts at preventing such competition. *See* 3 Phillip Areeda & Donald Turner, *Antitrust Law* ¶ 625b (1978). Pacific's only counterargument relies on *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Pacific contends that, because it had an incentive not to engage in the alleged conduct, such conduct cannot serve as a basis for a finding of predation. The problem with Pacific's position is that *Matsushita* does not so hold; in fact, the court did not even suggest that loss-inducing conduct could never constitute predatory conduct.

Because we find *Matsushita* to be inapposite, and because Pacific does not present any other arguments in

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[2] The Supreme Court has granted certiorari in *McQuillan v. Sorbothane, Inc.*, 907 F.2d 154 (9th Cir. 1990) (mem.), *cert. granted sub nom. Spectrum Sports, Inc. v. McQuillan*, 112 S. Ct. 1557 (1992) on the question of whether specific intent, market power, and dangerous probability of success can be inferred from predatory conduct. This grant of certiorari has no effect on Ninth Circuit law, of course, and we are bound by our decisions allowing such inferences.

support of its position, we reject Pacific's position. Dealing as we are with the bare complaint, we conclude that Primex has sufficiently alleged predatory conduct. The acts of which it complains arguably qualify as attempts to prevent competition. *See* Areeda & Turner, supra. Because Primex has adequately alleged predatory conduct, the *Thurman* inferences render Primex's complaint sufficient to satisfy the first three prongs of the test for attempted monopolization.

Primex's complaint fails, however, to allege antitrust injury. In order to prove such an injury, "the plaintiff must demonstrate that the defendant's conduct was intended to or did have some anticompetitive effect *beyond his own loss of business or the market's loss of a competitor.*" *California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727, 732 (9th Cir. 1979) (emphasis added). *See also McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 812 (9th Cir. 1988) ("The elimination of a single competitor, without more, does not prove anticompetitive effect.").

Primex's allegations focus entirely on the harms to Primex itself. For example, Primex contends that, as a result of Pacific Bell's acts, it has been unable to expand, it has lost clients and profits, it has suffered damage to its reputation, and it has purchased its own telephone system to avoid further problems with Pacific Bell. This is insufficient, because there is no suggestion in any of these allegations of harm to competition.[3]

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[3] There is one allegation in the complaint that merits additional discussion: Primex's assertion that "[d]efendants'

Primex attempts to bolster its position by pointing out that, though injury to a competitor does not necessarily constitute injury to competition, in some circumstances "injury to competitors may be probative of harm to competition." *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1040 (9th Cir. 1987), aff'd 496 U.S. 543 (1990). Such circumstances are the exception, however, and generally have been confined to situations in which "the relevant market is both narrow and discrete and the market participants are few." *Les Shockley Racing, Inc. v. National Hot Rod Association*, 884 F.2d 504, 508-09 (9th Cir. 1989). Primex does not contend that the market is narrow or discrete, nor does it suggest any other circumstances that might justify a finding that an injury to Primex constitutes an injury competition. We conclude, therefore, that Primex has alleged only injuries to itself, and that its allegations are insufficient to satisfy the antitrust injury requirement.

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conduct threatens to eliminate plaintiffs from the electronic information business and thereby establish a monopoly in all forms of 'yellow pages' advertising in defendants." This allegation differs from all the others in that it at least suggests the existence of some impact on the relevant market.

Despite its reference to a "monopoly," this allegation is insufficient. The only harm alleged is the elimination of Primex from the telephonic services market; the suggestion of a monopoly is mere speculation by Primex that no other company may enter the field. More important, there is no intimation of actual harm to competition. Primex does not allege, for example, that there will be barriers to entry as a result of its elimination from the market. At bottom, all that Primex is really alleging is that, if it folds, Pacific Bell will remain. This is insufficient to allege an antitrust injury.

II. The District Court's Denial of Primex's Motion for Reconsideration[4]

The district court rejected Primex's Rule 59 motion for a new trial for two independent reasons: first, the evidence that Primex sought to submit was not newly discovered or formerly beyond its reach; and second, even if the evidence had been beyond Primex's reach, it still failed to allege antitrust injury. We assume without deciding that Primex is correct in arguing that the district court should have considered the evidence whether or not it was newly discovered. Nothing turns on this issue, as the district court considered the evidence and correctly ruled that it did not sufficiently allege antitrust injury. Primex's supplemental evidence – consisting primarily of notes and memoranda prepared by Pacific's employees – arguably indicates that those employees perceived Primex as a competitor and that they wanted to harm Primex. It indicates nothing, however, about the existence of antitrust injury, because it reveals nothing about any actual effects on competition. The district court, therefore, did not abuse its discretion in rejecting Primex's motion for a new trial based on that material.

III. The District Court's Denial of Leave to Amend

Primex contends that the district court erred in refusing to allow it to amend its complaint in dismissing the

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[4] We apply an abuse of discretion standard in reviewing a district court's denial of a Rule 59 motion for reconsideration. *Hard v. Burlington Northern Railroad Co.*, 812 F.2d 482, 483 (9th Cir. 1987).

complaint and in denying Primex's motion to reconsider. Though there are four possible bases for a denial of leave to amend – bad faith, undue delay, prejudice to the opposing party, and futility of amendment, *Roth v. Garcia Marquez*, 942 F.2d 617, 628 (9th Cir. 1991) – the parties agree that the only basis for denying Primex the opportunity to amend is futility of amendment.

The futility standard is straightforward: it applies only if "it is clear that the complaint could not be saved by any amendment." *Trentacosta v. Frontier Pacific Aircraft Industries, Inc.*, 813 F.2d 1553, 1561 (9th Cir. 1987). In this case, as the discussion above indicates, the complaint's failure to allege antitrust injury could be remedied if it were amended to allege harm to competition (e.g., barriers to entry). Because such an amendment would save Primex's complaint, we cannot conclude that amendment would be futile. We find, therefore, that the district court erred in denying Primex leave to amend.

CONCLUSION

We affirm the district court's dismissal of Primex's first amended complaint and the denial of Primex's Rule 59 motion for a new trial. We reverse the district court's denial of leave to amend and remand for further proceedings. Each party will bear its own costs.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

YELLOW PHONE OF SAN FRANCISCO, YELLOW PHONE, INC., et.al. Plaintiffs, v. PACIFIC TELESIS GROUP, PACIFIC BELL, and PACIFIC BELL DIRECTORY, Defendants.	Civil Action No. C 90 2155 JPV ORDER ON DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT (Filed Apr. 5, 1991)
PACIFIC BELL, Counterclaimant, YELLOW PHONE OF SAN FRANCISCO, INC., and YELLOW PHONE, INC., and DOES A through Z, Counterdefendants.	

The motion of defendants Pacific Telesis Group, Pacific Bell and Pacific Bell Directory to dismiss the First

Amended Complaint came on regularly for hearing before this Court on March 7, 1991. Nick T. Reckas, Esq. of the Law Offices of Nick T. Reckas and Michael Brooks Carroll, Esq. of the Law Offices of Michael Brooks Carroll appeared on behalf of the plaintiffs and Joyce M. Norcini appeared on behalf of the defendants.

After consideration of the briefs and arguments of counsel, all other matters presented to the Court, IT IS HEREBY ORDERED THAT:

1. With regard to plaintiffs' first cause of action alleging a violation of Section 2 of the Sherman Act, the plaintiffs have failed to allege facts showing that there has been an antitrust injury, or an injury to competition. In addition, plaintiffs have failed to plead sufficient facts to establish a relevant market and to show that defendants have either an actual monopoly or pose a dangerous probability of successfully monopolizing the relevant market. For those reasons, defendants' motion to dismiss the first cause of action is granted.

2. With regard to plaintiffs' second cause of action alleging a violation of Section 1 of the Sherman Act, the Court makes the same finding: that the plaintiffs have failed to allege facts showing that there has been an antitrust injury, or an injury to competition. In addition, plaintiffs have failed to plead sufficient facts to establish a relevant market and to show that defendants have unreasonably restrained trade. For those reasons, defendants' motion to dismiss the second cause of action is granted.

3. The first and second caused [sic] of action are dismissed with prejudice and without leave to amend.

The facts alleged in the First Amended Complaint are such that it appears that plaintiffs will not be able to plead a violation of either Section 1 or 2 of the Sherman Act.

4. The Court declines to take pendant jurisdiction over the state law claims of in the Third through Seventh Causes of Action. These are dismissed without prejudice.

Dated: April 5 1991

/s/ John P. Vukasin, Jr.
John P. Vukasin, Jr.
United States District Judge

Approved As To Form:

Nick T. Reckas
Law Offices of Nick T. Reckas

Steven Strain
Law Offices of Michael Brooks Carroll

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

YELLOW PHONE, INC.; YELLOW PHONE OF SAN FRANCISCO INC.; and TALKING YELLOW PAGES, INC. dba PRIMEX, Plaintiffs, v. PACIFIC TELESIS GROUP, a corporation; PACIFIC BELL, a corporation; PACIFIC BELL DIRECTORY, a corporation, Defendants.	No. C 90 2155 JPV ORDER DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL (Filed June 10, 1991)

INTRODUCTION

Plaintiffs' Motion for New Trial was scheduled to be heard on Thursday, June 6, 1991. After a review of the briefs, this court considered it appropriate to submit the motion on the pleadings pursuant to Local Rule 220-1, and now DENIES the motion.

BACKGROUND

Plaintiffs operate a telephone information service, which provides business telephone numbers and addresses in response to telephone queries. The revenues come primarily from advertisers listed in the service. Plaintiffs use local telephone service for their operation.

Defendants own and publish and distribute a printed business telephone directory generally known as the "Pacific Bell Yellow Pages." Defendants have sole control over local telephone service in plaintiff's operating area.

Plaintiffs instituted an action against defendants under Sections 1 and 2 of the Sherman Antitrust Act, alleging, among other things, that defendants intentionally provided inferior telephone service in order to undermine plaintiffs' service to its customers.

On April 5, 1991, this court dismissed the complaint without leave to amend. The dismissal was based on plaintiffs' failure to plead sufficient facts to show that a relevant market existed, that defendants unreasonably restrained trade, and that an antitrust injury had occurred.

Plaintiffs subsequently filed this motion seeking a new trial, arguing that probative evidence was beyond their reach when the prior motion was decided. The proferred evidence was subject to a protective order imposed by the San Francisco County Superior Court in a prior related suit. Although subject to the protective order, the documents were in the hands of plaintiffs at the time they filed their original complaint in this case. Plaintiffs' attorneys did not apply to the state court for permission to reveal the contents of the restricted documents to the federal court until March 13, 1991, approximately seven months after the filing of their complaint in the federal case, and one week *after* defendants filed their motion to dismiss.

DISCUSSION

1. The evidence is not newly discovered or formerly beyond reach.

A party may move under Rule 59(e) for an amendment of a judgment to permit leave to amend the complaint. *Vincent v. Trend Western Technical Corp.*, 828 F.2d 563, 570 (9th Cir. 1987). One of the grounds for a motion under Rule 59(e) is newly discovered evidence. *Great Hawaiian Financial Corp. v. AIU*, 116 F.R.D. 612 (D. Hawaii 1987). The internal documents introduced here by plaintiffs are not newly discovered evidence nor were they unknown to plaintiffs since they were in the possession of plaintiffs' attorneys since May 1989.

Plaintiffs argue under *Moylan v. Siciliano*, 292 F.2d 704, 705 (9th Cir. 1961) that where the evidence is not newly discovered, the motion should be granted if the movant can show that it was for some reason beyond his reach at the time of trial. Although the documents in question were subject to a state court protective order at the time of the federal trial, plaintiffs did not seek written relief from that order until seven months after filing their complaint in this case and one week after defendants filed their motion to dismiss. Without having made any written attempt prior to trial to obtain relief from the protective order, plaintiffs cannot show that the documents were beyond their reach. The fact that plaintiffs secured the use of the documents for this action upon their first request for relief belies their contention that the documents were unavailable.

2. No antitrust injury

Even if the documents were beyond Plaintiffs' reach at the time of trial, and thus potential grounds for a Rule 59(e) amendment of the judgment, the contents of the documents do not establish sufficient facts to state a cause of action under Sections 1 and 2 of the Sherman Antitrust Act.

The submitted documents suggest a relevant market for telephonic information services, as the services appear reasonably interchangeable by consumers for the same purposes. *United States v. E.I. DuPont DeNemours & Co*, 351 U.S. 377, 395 (1956). The documents, however, do not alone, nor in conjunction with Plaintiffs' previously dismissed complaint, contain facts showing that there has been an anti-trust injury. An antitrust injury is one which reflects "the anticompetitive *effect* . . . of the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) [emphasis added]. Furthermore, "It is injury to the market or to competition in general, not merely injury to individuals or individual firms that is significant." *Ralph C. Wilson Indus. v. Chronicle Broadcasting Co.*, 794 F.2d 1359, 1363 (9th Cir. 1986). Plaintiffs must engage in market analysis of the defined market to show anti-competitive effect within that market or, alternatively, show output decreases, price increases or other generalized market problems. *Les Shockley Racing v. National Hot Rod Ass'n*, 884 F.2d 504 (9th Cir. 1989).

The documents here are defendants' internal planning memoranda, which are far from showing an anti-competitive effect on the relevant market. Neither these

documents nor any other facts alleged in plaintiffs' pleadings constitute a market analysis of detrimental effects to the relevant market. Moreover, the market problems which plaintiffs allege resulted from Defendants' actions are largely limited to harm to plaintiffs' individual business interests. Such proof would not, standing alone, show injury to competition in the market as a whole. *Les Shockley Racing v. National Hot Rod Ass'n* 884 F.2d 504, 508 (9th Cir. 1989).

Such deficiencies in the pleadings are not overcome by the generous standard applied to antitrust complaints. At minimum, the Plaintiffs must allege sufficient facts from which the court can discern the elements of an injury resulting from an act forbidden under antitrust laws. *Newman v. Universal Picture,* 813 F.2d 1519, 1521-1522 (9th Cir. 1987) [Citing *Lucas v. Bechtel Corp.,* 633 F.2d 757, 760 (9th Cir. 1980)]. The plaintiffs have not met that burden here.

ORDER

In accordance with the foregoing discussion, plaintiff's motion for a new trial is HEREBY DENIED.

IT IS SO ORDERED

DATED: JUN 10 1991

/s/ J. P. Vukasin, Jr.
J. P. VUKASIN, JR.
UNITED STATES
DISTRICT JUDGE

APPENDIX D

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TALKING YELLOW PAGES, INC., dba PRIMEX, Plaintiff-Appellant, v. PACIFIC TELESIS GROUP, a corporation; PACIFIC BELL, a corporation; PACIFIC BELL DIRECTORY, a corporation, Defendants-Appellees.	CA No. 91-15994 DC No. CV-90-02155-JPV ORDER (Filed SEPT. 16, 1992)

CANBY, Circuit Judge

The motion of appellees for a stay of mandate is GRANTED. The mandate is stayed to and including October 16, 1992. If, within that time, the Clerk of the Supreme Court notifies the Clerk of this court that a petition for certiorari has been filed, then the mandate is further stayed until final disposition of the matter by the Supreme Court.